United States Court of Appeals

for the Second Circuit

INTERVENOR'S BRIEF

ORIGINAL

76-4275

United States Court of Appeals

For the Second Circuit

COMMUNICATIONS WORKERS OF AMERICA, AFL-CIO, LOCAL 1122,

Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,

Respondent,

and

NEW YORK TELEPHONE COMPANY,

Intervenor.

On Petition for Review and Cross-Application for Enforcement of an Order of the National Labor Relations Board

BRIEF ON BEHALF INTERVENOR, NEW YORK TELEPHONE COMPANY

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Preliminary Statement

This brief is submitted on behalf of Intervenor, New York Telephone Company (hereafter "Company"), in support of its position that the actions of the Petitioner (hereafter "Local 1122") violated Sections 8(b)(3), 8(b)(1)(A)

and 8(b)(1)(B) of the Labor Management Relations Act, as amended (hereafter "Act").

The Company has since 1961 engaged in the practice of appointing bargaining unit employees to acting supervisory positions throughout the state-wide bargaining unit. This practice has been expressly recognized by the collective bargaining agreement with the Communications Workers of America AFL-CIO (hereafter "CWA").

One purpose of this practice is to enable the Company to fill temporary vacancies which occur when its permanent supervisors are out because of illness or vacations without having to hire additional permanent supervisors. This enables the Company to maintain a smaller permanent supervisory staff.

Another purpose of appointing acting supervisors is to enable the Company to evaluate bargaining unit employees for permanent promotion to supervisor. These acting supervisors are an important source of the Company permanent supervisory staff and the practice is an essential condition of employment of these bargaining unit employees.

The National Labor Relations Board (hereafter "Board") found that Local 1122 violated Section 8(b)(3) of the Act by unilaterally adopting a ban on its members' acceptance of acting foreman or supervisory positions, and, in its attempt to enforce that ban, unilaterally changed the terms and conditions of employment of a collective bargaining agreement and a Company practice without bargaining in good faith under Section 8(d) of the Act.

The Board found further that, by seeking to enforce the unlawful ban by internal union disciplinary proceedings against a member, Local 1122 also violated Section 8(b)(1)(A) of the Act.

The Board also held that the above actions constituted a violation of Section 8(b)(1)(B). Acting foremen represent the Company at grievance hearings. They have the authority to and in fact adjust grievances filed by constituent locals of the collective bargaining agent, the CWA, and adjust informal employee or union complaints before they ripen into grievances.

It is submitted that the Board's decision was in accordance with substantial evidence in the record before it, was consistent with established policy of the Act as interpreted by ample Board and Court precedent, and was consistent with time honored principles of labor relations and contract interpretation.

Statutes Involved

Section 8(b)(3)

> (b) It shall be an unfair labor practice for a labor organization or its agents—
>
> * * *
>
> (3) to refuse to bargain collectively with an employer, provided it is the representative of his employees subject to the provisions of section 159(a) of this title;

Section 8(d)

> (d) For the purposes of this section, to bargain collectively is the performance of the mutual obligation

of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party, but such obligation does not compel either party to agree to a proposal or require the making of a concession: Provided, that where there is in effect a collective-bargaining contract covering employees in an industry affecting commerce, the duty to bargain collectively shall also mean that no party to such *contract shall terminate or modify such contract, unless* the party desiring such termination or modification—. . . (Emphasis added)

Section 8(b)(1) A and B

(b) It shall be an unfair labor practice for a labor organization or its agents—

(1) to restrain or coerce (A) employees in the exercise of the rights guaranteed in section 157 of this title: Provided, that this paragraph shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein; or (B) an employer in the selection of his representatives for the purposes of collective bargaining or the adjustment of grievances;

[29 USC §158, (b) 1 and 3,
29 USC §158, (d)]

Relevant Contract Clauses (G. C. Exh. 2—E5)*

ARTICLE *5—Payroll Deductions of Union Dues*

Paragraph 5.04

> An employee's written authorization for such deductions shall be cancelled automatically by the Company when the employee is transferred, *except on an acting basis,* to a position wherein he is no longer covered by the terms of this Agreement. The Company will notify the Union of all such permanent transfers. (Emphasis added).

MEMORANDUM AGREEMENT—*Equalization of Overtime Procedures (E9)*

Subparagraph 8

> *An employee temporarily promoted to a management job* shall be charged with the average overtime of his unit during the entire period of his absence from his unit on the acting assignment. (Emphasis added)

ARTICLE *8—Transfers* (E.6)

Paragraph 8.01

> *The Company may transfer* or assign, *temporarily* or permanently, *any employee* from an occupational classification to another, or from one assignment to another within the same occupational classification, or *from an occupational classification to a position outside of the bargaining unit* either as a step in force adjustment or for other purposes. (Emphasis added)

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* The page references with the letters E, A and Tr refer to the pages in the Exhibit Volume, Joint Appendix or Transcript of the hearing before the Administrative Law Judge, respectively.

ARTICLE *11—Grievance Procedure** (Tr-25)

Paragraph 11.02

* * *

1st Step—The grievance shall be initially presented to *the appropriate authorized representative of the parties or their alternates at the immediate supervisory level of the Company* and the steward level of the Union. The grievance review shall be held promptly after appropriate investigation of the facts, and a reply given within seven (7) calendar days from the time of its initial presentation. *The management spokesman shall be the person at the immediate supervisory level.* A management representative at the second supervisory level (subdistrict) may be in attendance at these reviews and at those times he shall be the management spokesman. *The parties will seek in good faith to resolve the grievance at this step,* and to this end the review will be informal. Both the presentation of the grievance and the reply will be verbal. (Emphasis added)

* * *

The Company will submit to each Local Union a monthly summary of all first step grievances, filed by each such Local Union, showing for each grievance the grievance number, the subject, the grievance, the date heard, the Company supervisor who heard the grievance and the disposition of each such grievance.

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* This provision was not included in the Exhibit Volume but was part of General Counsel Exhibit 2, the collective bargaining agreement. Its consideration is essential because it represents an acknowledgement by the CWA that first level supervisors adjust grievances at the first step of the grievance procedure.

Issues

(A) Was the Board correct in its ruling that Local 1122 violated Section 8(b)(3) of the Act when it unilaterally banned, during the term of the existing collective bargaining agreement, the acceptance of acting foreman positions by members and instituted internal union disciplinary proceedings against a member who accepted such a position, where:

1. The contract between the Company and the CWA, the exclusive bargaining representative, as well as four preceding agreements, expressly recognized the Company's right to appoint acting supervisors;

2. The Company has made such appointments from 1961 to the present time throughout the statewide bargaining unit;

3. The CWA proposed to restrict the Company's right during the 1968 negotiations, but withdrew the proposal and signed the 1968 agreement and each subsequent agreement with provisions expressly recognizing the Company's right to make such appointments;

4. No agreement, oral or written, was ever entered into between the Company and the CWA, or the Company and any local union, including Local 1122, restricting or prohibiting the Company's right to make such appointments;

5. The collective bargaining agreement expressly recognizes that any waiver or modification must be signed by the Company and the CWA?

(B) Was the Board correct in its conclusion that Local 1122 violated Section 8(b)(1)(B) of the Act because permanent and acting supervisors had the authority to adjust grievances and informal complaints, where the record revealed that:

1. The Company and the CWA in Article 11 of the collective bargaining agreement recognized that grievances could be adjusted by permanent first line supervisors or their alternates at the first step grievance hearing;

2. Acting supervisors represented the Company at first step grievance hearings, including hearings where Local 1122 was represented;

3. The job description of the foreman positions specify that the supervisors are authorized to handle grievances or represent the Company at the first step hearings where decisions are made by the immediate supervisors;

4. The undisputed testimony of Company officials was that all supervisors had the authority to adjust grievances as well as informal complaints?

(C) Was the Board correct in its conclusion that Local 1122 violated Section 8(b)(1)(A) on the grounds, in part, that the ban against acceptance of acting supervisory positions was in violation of Section 8(b)(3) of the Act and therefore the intra-union charge did not stem from a lawful union rule dealing with internal affairs?

(D) Was Local 1122's ban a violation of Section 8(b)(1)(A) independent of the 8(b)(3) violation, where:

1. The CWA determined that a local's ban on acceptance of acting foreman positions was in violation of the CWA Constitution;

2. The temporary supervisor's performance as a supervisor is a fact considered by the Company in determining whether or not to promote him permanently; and

3. There was no evidence in the record that the ban was a result of a legitimate union concern involving internal union affairs?

Summary of Argument

Local 1122's Position

The 8(b)(3) Violation

There is no dispute that the Company had the express contractual right in at least five collective bargaining agreements, including the current one, to appoint bargaining unit employees to temporary supervisory positions. It was also conceded that the Company is engaged in a state-wide practice, dating back to 1961, of appointing bargaining unit employees as temporary foremen.

A statewide bargaining unit exists represented by the CWA, the National Union, and all collective bargaining agreements are negotiated by it. All agreements contained a provision requiring that waivers or modifications be signed by the Company or the CWA. No waiver or modification was signed restricting the Company's right in any part of the unit to appoint acting supervisors. There is also

no dispute that Local 1122 had unilaterally imposed its ban after the CWA's demand to curtail the Company's right to appoint acting supervisors was rejected in the 1968 collective bargaining negotiations.

Despite these undisputed facts, Local 1122 is seeking to persuade this Court that the Company waived its contractual right and agreed to the ban by failing to appoint acting supervisors in the brief interlude of 1½ years prior to 1971 within Local 1122's limited geographic jurisdiction, while continuing the apointments in the remainder of the state.

Local 1122 would have this Court believe further that the Company's resumption of the practice in 1972 in Local 1122's geographic jurisdiction amounted to a unilateral change of a term and condition of employment. This argument ignores the significant facts that in 1971 and 1974, new collective bargaining agreements were signed by the CWA without any restriction on the Company's express rights in this regard; the Company's practice of appointing acting supervisors from the bargaining unit continued statewide, and since 1972 was actively pursued without protest from Local 1122 within its geographic jurisdiction.

Local 1122's position flies in the face of the compelling rule of law that in the absence of clear and unmistakable language to that effect, waiver will not be inferred. It is also contrary to the intention of the Company and the parent union, the CWA, as expressed in

Article 30 of the agreement—that no waiver or modification of any contractual rights is to be effective unless in writing and signed by the parties of the agreement.

The 8(b)(1)(B) Violation

Local 1122 also argues that Section 8(b)(1)(B) was not violated because neither permanent nor acting supervisors possessed the authority to adjust grievances. This conclusion has no support in the record.

The grievance hearing minutes (G.C. Exhs. 23-47, E-62-106) in evidence, proved that acting first-line supervisors represented the Company fully at first step grievance hearings and disposed of grievances by either granting or denying them. In some of the grievance hearings, Local 1122 itself participated.

Furthermore, Company job descriptions (R Exhs. 2-10, E-109-122) describe the duty of permanent foremen as the Company's representative at first step grievance hearings, and the Company and the CWA in Article 11 of the Collective Bargaining Agreement recognized this role of the foreman. The uncontradicted testimony of Company witnesses was that acting supervisors had the same authority as permanent supervisors to adjust formal grievances and informal complaints.

Local 1122's position is contrary to the requirements of 8(b)(1)(B). Employer representatives meet the test of 8(b)(1)(B) even if they have the authority to adjust minor, low level grievances, or informal complaints before they

ripen into grievances. Moreover, they meet the test even if they never exercise this authority but have the potential to exercise it.

The 8(b)(1)(A) Violation

Local 1122 also argues that its action represented a legitimate union interest and therefore there was not a violation of 8(b)(1)(A). It is submitted, to the contrary, that Local 1122 had interfered with the employment status of its members—promotion—in which it had no legitimate interest as a labor organization. The uncontradicted evidence revealed that the employee's behavior as an acting supervisor enabled the Company to judge his ability and was a factor considered by the Company in making a permanent promotion to supervisor. The ban effectively restricted the bargaining unit employee's opportunity to be promoted.

Local 1122's position is also contrary to the position taken by the national union, the CWA, which decided that such bans on temporary supervisory assignments was in violation of the CWA Constitution.

Facts

A. The Unit

The CWA has been the exclusive collective bargaining representative of a 30,000 member state-wide bargaining unit since 1961. All agreements are negotiated on a statewide basis by the CWA. Any modification or waiver of the agreement must be in writing and signed by the parties to the contract themselves (G.C. Exh. 2, Article 30, E-7). Local 1122, one of 22 locals in the unit, has jurisdiction over about

1,000 employees who are employed in the Buffalo area of New York. The officers of all the CWA locals are subordinate to CWA District No. 1, which is headed by CWA Vice President Morton Bahr (A-163).

B. The Contractual Right to Appoint Acting Supervisors

In every local union's jurisdiction, the Company has engaged in the practice of appointing members of the bargaining unit as foremen for temporary periods. This practice dates back to 1961. The length of time that these unit employees worked as acting supervisors ranged from a few days to several weeks and even several months.

The Company's use of acting supervisors occurs under circumstances where permanent first line supervisors had to be temporarily replaced either because of illness or vacations. However, during the period that the bargaining unit employee is in the position of a temporary supervisor, he has the opportunity to demonstrate his management ability, and the employer is afforded the opportunity of observing the individual's performance and evaluating him as a potential permanent member of supervision. They are a primary source of the Company's supervisory staff (A-114, 118-128).

The Collective Bargaining Agareement expressly recognizes this practice. Article 8, *Transfers,* provides:

> "The Company may transfer or assign, temporarily or permanently, any employee from an occupational classification, *or from an occupational classification to a position outside of the bargaining unit* either as a step

in force adjustment or for other purposes . . .'' (G.C. Exh. 2, E-2). (Emphasis added)

The Memorandum Agreement on Equalization of Overtime Procedures, Subparagraph 8 provides:

> ''An employee temporarily promoted to a management job shall be charged with the average overtime of his unit during the entire period of his absence from the unit on the acting assignment.'' (G.C. Exh. 2, E-9)

Article 5, *Payroll Deductions of Union Dues,* Paragraph 5.04, also provides:

> ''An employee's written authorization for such deductions shall be cancelled automatically by the Company when the employee is transferred, *except on an acting basis,* to a position wherein he is no longer covered by the terms of this Agreement. . . .'' (G.C. Exh. 2, E-5) (Emphasis added)

These provisions of the current Agreement have been in effect in substantially the same language at least since the 1964 Collective Bargaining Agreement (G.C. Exh. 6, E-10).

In 1968, the Company and the CWA entered into collective bargaining negotiations. In the course of the negotiations, the CWA introduced a demand that would have reduced the seniority of employees who accepted acting supervisory positions (G.C. Exh. 14, E-20). This proposal was rejected by the Company and was not thereafter introduced by the CWA in the subsequent collective bargaining negotiations that took place in 1971 and 1974 (A-44).

The undisputed testimony of Mr. Babington, the Company witness who participated in the negotiations in 1968,

1971 and 1974 for the Company was that when the proposal was introduced by the CWA in 1968, its representative stated that it was intended to curb the Company's practice to appoint acting supervisors. In rejecting this proposal, the Company representative, Mr. Littel, informed the Union that the Company had no intention of diminishing its contractual right to appoint bargaining unit employees to temporary foreman positions (A-142-143). The 1968 Collective Bargaining Agreement was signed with no restriction on the Company's right.

C. The 1969 Meeting with Local 1122

Mr. Hennessy, a Company witness and Division Plant Superintendent in the Western Area from 1968 to 1971 (A-61) had called a meeting with representatives of Locals 1122, 1117, and 1115 in April 1969 to discuss the summer hire program, as was customary (A-202, 211-213). The Company had been made aware of Local 1122's intention to unilaterally invoke a ban against acting supervisors, so Mr. Hennessy asked Local 1122 to refrain from doing so. In return, the Company would be prepared to discuss certain proposals including one that would limit the number of acting supervisors to a certain percentage of employees in the three locals' jurisdiction (A-213-214). Mr. Hennessy's offer to discuss was rejected by Local 1122 and it unilaterally instituted its ban (A-216, 231-233).

D. The Practice of Appointing Bargaining Unit Employees as Temporary First Line Supervisors

The practice of appointing bargaining unit employees as temporary foremen dates back at least to 1961, and continued through 1975 throughout the state-wide bargaining unit (A-53, 59-61, 119-120, 125-126, 149).

In the jurisdiction of Local 1122, bargaining unit employees have acted as first line supervisors continuously from 1962 through 1969. From 1972 through 1975, 41 unit employees in Local 1122's jurisdiction had been appointed temporary foremen on 113 different occasions. In 1973 and 1974 alone, 34 employees in Local 1122's jurisdiction accepted temporary supervisory positions on 60 different occasions. At no time did the Company ever abandon its practice (G.C. Exh. 16, E-21).

For a brief period from 1969 to August 1972, employees had not been appointed acting supervisors within 1122's jurisdiction. However, for more than half of 1971, the entire bargaining unit was on strike. During the rest of this period Local 1122's ban was evidently effective. Employees were never disciplined for not accepting a position (A-55, 126).

At no time between August 1972 and December 1975 did Local 1122 file a grievance protesting the appointments that occurred in that period (A-233), or file an unfair labor practice charge against the Company claiming that the Company unilaterally changed the term and condition of employment. Moreover, at no time until June and July 1975 did it reaffirm

its ban or seek to punish any members for accepting temporary positions.

In appointing acting foremen, the permanent supervisor would inform the bargaining unit employee of his duties, tell him that he is in charge, explain the grievance handling problems, overtime problems, and the other situations that a foreman is normally confronted with (A-89, 120).

The CWA recognized the existence of this practice by the following provision in its constitution which permits acting supervisors to remain members of the Union:

> "(A) Membership in the Union shall be terminated when any member shall accept a position which would render him ineligible for membership, except that a member who temporarily assumes such a position may retain membership for a period not to exceed thirty (30) days, . . ." (G.C. Exh. 8, E-12).

The CWA ruled that a ban on acting supervisors was in violation of the CWA Constitution (G.C. Exh. 8, E-12).

E. The Authority of Acting Supervisors as to Grievances and Informal Employee Complaints

The record reveals that permanent first line supervisors have authority to receive and hear grievances, to adjust them, and to adjust informal complaints or problems (A-56, 128) (G.C. Exh. 2, Article 11, R Exhs. 2-4, 10, E-109-122). Acting supervisors have the same authority (A-57, 128, 130) (G.C. Exhs. 19-21, 23-47, E-31, 40, 42, 62-108).*

* G.C. Exhibits 23 through 47 are Company minutes or reports of first step grievance hearings. In each of those instances, an acting supervisor accepted the grievance on behalf of the Company, or represented the Company at the hearing, or gave the Company answer to the Union or did all three.

The authority of permanent first line supervisors at grievance hearings was recognized by the CWA and the Company in Article 11 (Grievance Procedure) of the Collective Bargaining Agreement.

Respondent's Exhibits 2-4 and 10 (E-109-122) confirm that this authority exists. The relevant portions are as follows:

R Exh. 2

Service Bureau Foreman—Repair

p. 2 #19—Participates in First Step Union Grievances

R Exh. 3

Line Foreman—Buried

p. 3 Contacts; The normal grievance procedure requires that the incumbent have occasional dealings with the union representatives *in order to resolve problems between craft and management.* (Emphasis added)

R Exh. 4

Cable Splicing Foreman

p. 3 #7—Administers and performs functions associated with the supervision of NYT field personnel: . . . Union-Management Agreements.

R Exh. 10

Splicing Foreman—Maintenance

p. 4 Contacts; . . . represents NYT management at first step in the grievance procedure and, as such, has occasional contact with union representatives.*

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* All of the supervisory positions represented in R Exhs. 2-4 and 10 are excluded from the bargaining unit as supervisors under Section 2(11) of the Act.

Out of 25 grievances at various locations in the Upstate Territory of the bargaining unit, 16 acting supervisors were involved in the first step of the grievance procedure in one way or another between 1962 and 1975.* These acting supervisors accepted the grievance, participated in the first step grievance hearing, or gave the Company answer to the grievance. In fact, in 1973, Local 1122 presented two grievances to an acting supervisor, Joseph T. Maloney (G.C. Exhs. 20 and 21, E-40, 42).

In addition to formal grievances, permanent and temporary supervisors have the authority to adjust informal employee complaints (A-112, 130).

ARGUMENT

POINT I

The Board was correct in its conclusion that Local 1122 violated Section 8(b)(3) of the Act by unilaterally banning the acceptance by its members of temporary supervisory positions.

It is beyond cavil that the Board is the agency charged with the primary function of enforcing national labor policy. Because of its unique responsibilities exercised over the years, it has acquired an expertise which the Courts are bound to accord a degree of deference. As Justice Frankfurter appropriately observed in defining the Court's role in reviewing "the whole record" before the Board in *Universal Camera Corp.* v. *NLRB,* 340 U.S. 474 (1951):

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* G.C. Exh. 19, E-31, is a summary of the actual minutes or reports of the first step grievance hearings. G.E. Exhs. 23 through 47 are the actual minutes or reports of those first step grievance hearings (E-62-108).

> ". . . Nor was it intended to negative the function of the Labor Board as one of those agencies presumably equipped or informed by experience to deal with a specialized field of knowledge, whose findings within that field carry the authority of an expertness which courts do not possess and therefore must respect. Nor does it mean that even as to matters not requiring expertise a Court may displace the Board's choice between two fairly conflicting views, even though the Court would justifiably have made a different choice had the matter been before it *de novo*." (at 488)

A similar view was expressed earlier in *NLRB* v. *Virginia Electric & Power Co.*, 314 U.S. 469 (1941) when Mr. Justice Murphy stated:

> ". . . we must ever guard against allowing our views to be substituted for those of the agency which Congress has created to administer the Act." (at 476)

Judicial restraint in reviewing the Board's decision here is especially appropriate. Local 1122 is asking this Court to overrule time honored doctrines embodied in Section 8 (b)(3) and in Board decisions that prohibit unilateral action to change collective bargaining agreements.

A fundamental purpose of that Section is to ensure that once parties have stabilized their relationship by entering into a collective bargaining agreement, neither party may place that stability in jeopardy by unilateral action. *Lion Oil Co.*, 109 NLRB 680 (1954), *aff'd* 352 U.S. 282 (1957).

Although the agreement between the parties in this case was negotiated by the Company and the CWA, Local 1122, as a constituent local of the CWA, is equally bound by this

statutory obligation. *Machinists Airline District 146,* 177 NLRB 516 (1969).

It is the foregoing principle that Local 1122 is asking this Court to ignore. The Company's right to appoint acting supervisors from the ranks of bargaining unit employees has been expressly recognized by five successive collective bargaining agreements dating back at least to 1964. Article 8, *Transfers,* grants the Company the right to transfer employees temporarily to positions outside of the bargaining unit. The agreements also provide for special treatment for acting supervisors with regard to dues deductions and equalization of overtime.

Moreover, this Company practice dates back at least to 1961, and continued throughout the bargaining unit until the present time.

The essential defect in Local 1122's position is its claim that this contractual right ceased to be an existing term and condition of employment merely because for a brief interlude, (1½ years) in which acting supervisors were not appointed within Local 1122's narrow geographic jurisdiction.

This argument ignores the fact that by imposing the ban in 1969, just one year after the 1968 contract or bargain was struck in which the Company's explicit right was reaffirmed, Local 1122 sought to obtain unilaterally what the CWA could not obtain in negotiations. In the 1968 negotiations, the CWA introduced a demand to deprive employees who accepted acting supervisory positions of a certain amount of seniority. This demand was rejected, and the

Company expressly reaffirmed its intention to retain the contractual right unrestricted. The bargain between the CWA and the Company was struck and neither the 1968 agreement nor any subsequent one contained restrictions on the Company's right.

To argue that Local 1122's unilateral ban imposed while the ink on the 1968 contract was still wet is not a violation of Section 8(b)(3) is to completely misunderstand the leading decision on similar facts in *CWA AFL-CIO Local 1170 (Rochester Telephone Corp.)*, 194 NLRB 872 (1972), affirmed by this Court in 474 F.2d 778 (2nd Cir. 1972), as well as this Court's view of Section 8(b)(3) spelled out in *New York District Council No. 9* v. *NLRB* 453 F.2d 783 (2nd Cir. 1971), *cert. denied* 405 U.S. 988 (1972) (the *Westgate* case).

In the Rochester case, during the 1968 collective bargaining, the CWA sought to restrict the Employer's practice of assigning unit employees to temporary supervisory positions. The Union withdrew its demand in return for a letter of commitment from the Employer outlining its procedures for implementing the practice. The agreement contained similar equalization of overtime provisions giving acting supervisors special treatment.

The Union did not renew its demand to abolish the Employer's practice in any subsequent negotiations. Three years and two contracts after the initial CWA demand in 1968, it unilaterally adopted a ban and filed charges against two employees who had accepted temporary supervisor assignments.

The Board concluded that the Employer had a right to rely on the bargain struck in 1968. By adopting the ban, the Union attempted unilaterally and in mid-term to alter the existing agreement, and was consequently in violation of Section 8(b)(3) of the Act. The Board also found that the Employer was not obligated to bargain with the Union during the term of the agreement on any Union demand to change the agreement.

This last point is significant and is equally applicable to the Company's action in this case. While the Company did offer to discuss the proposed ban, which offer Local 1122 rejected, the Company was not required to negotiate with, or arrive at any agreement with Local 1122. The Company had every right to insist on its existing contractual right.

In the *Rochester* case, the Union there was successful in the 1968 negotiations in getting the employer to modify its contractual right. In our case, the CWA was not successful in getting the Company to do so. A bargain was struck reaffirming *in toto* the Company's pre-existing right. If anything, the Company's position here is even stronger than the Employer's in the *Rochester* case.

In the *Westgate* case, this Court under similar circumstances to those in the instant case, also found a Section 8(b)(3) violation. In that case, during negotiations, the parties failed to reach an agreement on the Union's demand setting maximum production schedules. The contract that was signed, however, did provide for a 35-hour work-week. During the term of that agreement, the Union adopted a rule unilaterally limiting to 10 the number of rooms an employee could paint per week. Even though the contract

was silent regarding production schedules, this Court held that Section 8(b)(3) was violated on the grounds that the rule effectively modified the contract term providing for a 35-hour work-week. In the instant case, the contract is not silent, but contains several clauses recognizing the Company's unrestricted right to appoint acting supervisors.

The *Rochester Telephone* holdings were applied in a persuasive decision rendered by Julius Cohn, Administrative Law Judge in *New England Telephone and Telegraph Company* on June 17, 1976, case no. 1-CB-2861 (not reported —opinion attached). The facts were almost identical to the case at bar, except that in *New England,* the unilateral ban was imposed by the collective bargaining agent, the national union, whereas here the ban was imposed by a constituent local.

In the *New England* case, the applicable contracts (3 units were involved), provided for a loss of seniority for employees who accepted acting supervisory positions. Between 1971 and through 1974 the IBEW, the bargaining agent, on several occasions unilaterally banned the acceptance of acting supervisory positions. Until the 1974 ban, New England Telephone did not protest, even though union members in the past had observed the bans.

As in *Rochester Telephone,* Judge Cohn concluded that New England Telephone had a contractual right to appoint employees to acting supervisory positions and held that the 1974 ban imposed by the IBEW violated Section 8(b)(3) of the Act.

The IBEW's arguments that the employer lost its rights because it failed to request bargaining under 8(d) and also

waived its right by failing to protest the prior bans, were rejected. Judge Cohn observed that there was no affirmative obligation upon the employer to bargain away its existing contractual right. As to the waiver argument, the Judge cited the decision of *Gary-Hobart Water Corp.* v. *NLRB*, 511 F.2d 284 (7th Cir. 1975) to the effect that waivers would not be inferred readily without clear and unmistakable language. The Judge stated:

> "Respondents cannot point to any written document or provision indicating a waiver by the Company of its rights, only to inaction on several occasions to enforce them. *For whatever reasons the Company may have had for not pursuing the matter on prior occasions, and, it is noted that these occurred during collevtive bargaining negotiations, it is apparent there was no express conduct on the part of the Company which would indicate it was waiving its rights formally and legally to protest the ban.*" (ALJ Cohn—*New England Telephone* p. 9, lines 29-36, emphasis added)

In support of its position here, Local 122 relies solely on the mere non-existence of acting supervisors within its limited geographic jurisdiction for the brief interlude of 1½ years. However, there was a 7-month strike of the entire bargaining unit from July 14, 1971 to February 18, 1972, and during the remainder of that brief interlude the local's ban was evidently effective.

In any event, as Judge Cohn noted in the *New England* case *supra*, there are reasons why the Company may not have wished to take any action against the ban. But from the bare fact of the non-appointment for this brief period in 1122's jurisdiction, one cannot conclude that a substan-

tial contractual right and statutory right to compel a union to bargain in good faith under 8(b)(3), was waived.

Fortunately, the law requires a much higher standard of proof in order to establish such a waiver. An express statement, oral or written, by the party alleged to have bargained away or waived its rights is required to establish a waiver. *International News Service, Div. of the Hearst Corp.*, 113 NLRB 1067 (1955); *Spiedel Corp.*, 120 NLRB 733 (1958); *Beacon Piece Dyeing and Finishing Co., Inc.*, 121 NLRB 953 (1958); *The Berkline Corp.*, 123 NLRB 685 (1959); *Gulf Atlantic Warehouse Co.*, 129 NLRB 42 (1960).

The controlling principle was summarized in *The Press Co., Inc.*, 121 NLRB 976 (1958), as follows:

> "It is well established Board precedent that, although a subject has been discussed in pre-contract negotiations and has not been specifically covered in the resulting contract, the employer violates Section 8(a)(5) of the Act if during the contract term he refuses to bargain, or takes unilateral action with respect to the particular subject, *unless it can be said from an evaluation of the prior negotiations, that the matter was 'fully discussed' or 'consciously explored' and the union 'consciously yielded' or clearly and unmistakably waived its interest in this matter.*" (at 977-978) (Emphasis added)

If Local 1122's concept of waiver were applied to its logical extent, a finding that it violated Section 8(b)(3) would still be required. Assuming *arguendo* only, that the Company's reinstatement of the practice of appointing supervisors in 1972 violated Section 8(a)(5), Local 1122's

conceded failure to protest this reinstatement from 1972 through 1975 under its own logic must be considered a waiver of its right to insist on the Company's 8(a)(5) obligation. Furthermore, by this waiver of Local 1122's right, a new term and condition of employment came into effect sometime after 1972—that of appointing temporary supervisors. Therefore, Local 1122's enforcement of its ban in July 1975 violated 8(b)(3). This kind of reasoning is tortuous and obviously should not be permitted to rise to the level of a principle of law.

Local 1122's theory of waiver could have a disruptive effect upon the collective bargaining process as well as on the state-wide bargaining unit. It would mean that despite existing contractual language, despite the unsuccessful attempts by the CWA—the bargaining agent—to bargain away the Company's right, the Company may still lose this right almost inadvertently, when a constituent local unilaterally takes action contrary to express contractual language. The 22 locals in the state-wide bargaining unit could thereby create a checkerboard pattern of rights and obligations that would make the state-wide collective bargaining agreement virtually unenforceable.

Local 1122's reasoning also ignores elementary principles of contract interpretation consistently applied by labor arbitrators. They have held repeatedly that the failure to enforce a contractual right will not be deemed to be a waiver of that right, or acquiescence in the breach of the contract by the other party, unless there is clear evidence to that effect and, the waiver is by one in authority to waive the provisions of the agreement. Moreover, even if waiver is

proven by clear evidence, arbitrators generally hold that the waiver or acquiescence will not affect the future conduct of the parties under the agreement but is only related to past transactions. Arbitrators are so reluctant to imply a waiver of express contractual rights that they have even held that there is no waiver unless the other party has been misled to his prejudice, damage or injury, or unless some other element of estoppel is present. See *e.g., Coakley Brothers Company*, 47 LA 356 (Arb. Anderson, 1966); *Bethlehem Steel Company*, 36 LA 162 (Arb. Seward, 1961); *Higgins, Inc.*, 24 LA 750 (Arb. Morvant, 1955); *Texas-New Mexico Pipe Line Company*, 17 LA 90 (Arb. Emery, 1951); *Durham Hosiery Mills*, 12 LA 311 (Arb. Maggs, 1949). See also Elkouri *How Arbitration Works*, pp. 349-350 (BNA 1973 edition). It is respectfully urged that these decisions and the underlying reasons are persuasive.

In summary, Local 1122's theories do severe injury to several elementary principles of law. First, under the Act, a party has the right to insist upon the 8(b)(3) obligation of the other party to an agreement. Local 1122 could not unilaterally change an existing term and condition of employment unless it followed the requirements of Sections 8(b)(3) and 8(d), *i.e.*, if no express agreement is reached, the existing term and condition must remain in effect.

Second, no waiver or acquiescence in a breach of contract or in an 8(b)(3) violation can be inferred unless clear evidence exists that the waiver was agreed to by someone in authority to do so. Moreover, even if a waiver can be inferred, that waiver is only applicable to past transactions.

Third, under the law and the Collective Bargaining Agreement, the Company was obligated to negotiate any modification of the agreement with the collective bargaining agent, the CWA. It could not have negotiated and arrived at an agreement with Local 1122, a constituent local, without the express authorization in writing by the CWA.

POINT II

The Board was correct in its conclusion that Local 1122 violated Section 8(b)(1)(B) of the Act.

Section 8(b)(1)(B) provides that it is an unfair labor practice for a union to "restrain or coerce . . . an employer in the selection of his representatives for the purpose of collective bargaining or the adjustment of grievances." 29 U.S.C. §158(1)(b). In the leading decision of *Florida Power & Light Co.* v. *IBEW*, 417 U.S. 790 (1974), the Supreme Court outlined the applicable rule under Section 8(b)(1)(B) as follows:

> ". . . a union's discipline of one of its members who is a supervisory employee can constitute a violation of Section 8(b)(1)(B) only when that discipline may adversely affect the supervisor's conduct in performing the duties or in acting in his capacity as grievance adjuster or collective bargaining representative on behalf of the employer." (at 804-805)

The Court held that Section 8(b)(1)(B) did not intend to protect either an employer or a supervisor for engaging in activities such as crossing picket lines or engaging in rank-and-file struck work, activities clearly within the scope of a union's legitimate area of concern.

This supports the Company's position here. Local 1122's disciplinary proceedings against its member, Mr. Macvie, were commenced because he was a temporary supervisor. As the record reveals, and Local 1122 concedes in its brief, the main reason why it objected to its members' acceptance of temporary supervisory positions was because of their presence or participation in grievance reviews. The effect of Local 1122's disciplinary proceedings against Macvie would be to prevent union members from accepting the acting supervisor position in the first instance and to prevent them from representing the Company as grievance adjusters within the meaning of Section 8(b)(1)(B).

Board precedent not overruled by *Florida Power and Light* teach us that union discipline imposed upon union members who represent *or who might represent the employer* in the adjustment of grievances are per se violations of the Act. *Teamster Local 663,* 193 NLRB 581 (1971). In that case, the Board held that the proposed discipline of union members who accepted temporary supervisory positions in the employer's plant in which there was no strike going on, and who were appointed temporary supervisors not for the purpose of relieving other supervisors in a struck plant, was in violation of Section 8(b)(1)(B).

In *New England Telephone and Telegraph, supra,* Administrative Law Judge Julius Cohn, held that IBEW's ban also coerced the employer in violation of Section 8(b)(1)(B). He stated that under the Supreme Court ruling in *Florida Power and Light, supra,* the test was whether or not the effect of the union's action would be adverse to the supervisor's performance of his 8(b)(1)(B) duties. See also *Hammond Publishers, Inc.,* 216 NLRB 149 (1975).

Moreover, Section 8(b)(1)(B) does not require the employer's representative to participate in formal grievances only. It is sufficient for the representative involved to have the authority to resolve employee problems and complaints even before they ripen into formal grievances. *Newark Newspaper Pressman's Union No. 8*, 194 NLRB 566 (1971); *Meat Cutters Local 181*, 185 NLRB 884 (1970).

The Board stated in *Newark Newspaper Pressman* that "the handling of minor complaints other than as formal grievances—does constitute the adjustment of grievance within the meaning of . . ." Section 8(b)(1)(B). Even if the minor complaints become grievances, they need not be major or complex grievances in order for the grievance adjuster to come within the protection of Section 8(b)(1)(B). See *e.g., Erie Newspaper Guild* v. *NLRB*, 489 F.2d 416 (3rd Cir. 1973) [where it was held that the handling of minor grievances was sufficient]; *Warehouse Union Local 6 (Associated Food Stores)*, 210 NLRB 666 (1974) [where the Board held that working foremen who handle "low line" grievances—that is, work related problems handled on the plant floor with the immediate steward, combined with evidence that "some results ensue" made the working foremen Section 8(b)(1)(B) representatives].

Local 1122's contention that neither supervisors nor acting supervisors possessed, or exercised authority to adjust grievances must be examined closely. It is unsupported by the record, and represents a direct attack upon the grievance procedure agreed to by the CWA, in effect since the collective bargaining relationship began in 1961.

The only evidence in the record on this point was introduced by the General Counsel and was undisputed at the

hearing. The evidence proved that acting supervisors had the identical authority as that of the permanent supervisors, and General Counsel witnesses Hennessy and Jordan both testified without contradiction that all first line supervisors, permanent and acting, had the authority to adjust grievances. Local 1122 produced no testimony or documentary evidence at the trial to the contrary.

Respondent's Exhibits 2-16, the Company Position Guides describing the duties of the first line supervisory positions assumed by the bargaining unit employees on a temporary basis, contain references to the grievance handling duty. To cite just a few examples:

R2. *Service Bureau Foreman—Repair,*
"Participates in first step union grievances" (E-110)

R3. *Line Foreman—Buried,*
"Contacts" . . . the normal grievance procedure requires that the incumbent has occasional dealings with union representatives *in order to resolve problems between craft and management.* (Emphasis added) (E-113)

R4. *Splicing Foreman*
"7—Administers plans and performs functions associated with supervision of NYT field personnel: . . . Union Management Agreements"

* * *

"Authority" . . . Decisions frequently involve a high degree of judgment." (E-116, 117)

R10. *Splicing Foreman—Maintenance*
"Contacts . . . The incumbent represents NYT Management at first step in the grievance procedure and, as such, for occasional contact with union representatives." (E-121)

The balance of Respondent's Exhibits 2-16 that were not included in the Exhibit binder, but were part of the record before the Board, contain similar language. There is not one item that could be referred to by Local 1122 in any of these documents which in any way restricts the supervisor in the exercise of his discretion in the performance of his duty as a representative of the Company in the first step grievance hearing.

Respondent's Exhibits No. 2-16 contain lengthy and detailed listings of all the duties of the supervisory positions described. These positions have always been considered supervisors within the meaning of Section 2(11) of the Act. The Company and the CWA recognized this and have excluded them from the bargaining unit (G.C. Exh. 2, Article 1, Recognition, E-3). This is important when we consider that the basis of Local 1122's argument that there was no violation of Section 8(b)(1)(B) is its unsupported contention that supervisors, permanent and temporary, do not exercise independent discretion as grievance adjusters, citing *Brown* v. *Sharpe Manufacturing Co.*, 169 F.2d 331 (1st Cir. 1948) (p. 7 of Local 1122's brief). But the Court in that case held that in order to be within the definition of a supervisor under Section 2(11) you must have the authority to perform any one of the duties listed in Section 2(11) and to exercise any of them with independent judgment. The Court stated:

> ". . . It seems to us evident that Congress meant to embrace within their scope only employees with authority to use their independent judgment with respect to some one or more of the specific authorities enumerated". (at p. 334).

The Court explained that the use of independent judgment meant that the exercise of the authority was not merely of a routine, clerical nature.

The evidence in the record on whether or not the supervisors described in Respondent's Exhibits Nos. 2-16 are Section 2(11) supervisors with regard to their other duties is neither greater nor less than the evidence that these supervisors exercised independent judgment in their grievance or complaint handling duty. Local 1122 acknowledges that these supervisors were Section 2(11) supervisors because they exercised independent judgment with regard to their other duties. There is therefore no reason to hold, and nothing in the record to support a conclusion that the supervisors' duty to adjust grievances was exercised in any different manner than their exercise of all the other duties described in these exhibits.

General Counsel's Exhibits No. 23-47 (E-62-108) were all minutes or reports of first step grievances and each of them represented separate distinct grievances. They were grievances in which acting supervisors either received a grievance, or represented the Company at the first step grievance hearing, or gave the Company answer, or did all three. Each of the documents clearly states what the disposition of the grievance was. There is nothing in any of the documents which in any way indicate that the acting supervisor who handled the grievance did not utilize independent judgment. Not one shop steward or officer of Local 1122, or any other participant in any of the grievances involved, or any representative of the CWA, was called to testify that in the first step grievance hearings in which

they participated with management represented by the foregoing exhibits, the first line supervisors received instructions from higher management and did not make the decisions using their own independent judgment.

To support its position that no independent judgment was exercised Local 1122 argues that the decisions were made on the merits either in accordance with the collective bargaining agreement or established Company policy after consultation with superiors. The logical but absurd result of this reasoning is that if the Company produced evidence that supervisors made decisions contrary to the contracts or Company policy, then Local 1122 would have to concede that supervisors exercised independent judgment and were, therefore, Company representatives within the meaning of Section 8(b)(1)(B) of the Act.

One must assume however, that a decision that is, or is not in accord with a document as complicated as a collective bargaining agreement, or with the Company policy, must have been made with a certain amount of independent judgment. Even to deny a grievance requires an exercise of judgment, and as the exhibits indicate, many grievances were denied. Moreover, a cursory glance at the exhibits (E-62-108) would indicate that the subjects of the grievances were complex and the decisions could not have been of a mere clerical nature.

While it is true that Mr. Hennessy stated that less experienced foremen at the first step adjust grievances themselves on more routine cases, and on more complicated cases, *consult* superiors, he did not testify that they did not exercise independent judgment. The evidence reveals

that more experienced first line supervisors, either permanent or temporary, do not consult superiors or the Company Labor Relations Department to discuss the matters. The evidence reveals further that acting supervisors had acquired experience because many of them had served in that capacity on many occasions, and for different periods of time.

Notwithstanding the above, one cannot engraft into the law the requirement that in order to be considered a supervisor or an 8(b)(1)(B) representative, he may not seek advice from a superior in the exercise of his Section 2(11) duties. Every member of management, regardless of what level, seeks at one time or another, advice either from superiors or from other experts in the field.

There is no requirement in the law that grievance adjusters must adjust only complicated formal grievances. The Board cases cited *supra*, hold that the adjustment of "low-line" or minor, routine grievances, where there is evidence that "some results ensue" is sufficient. The authority of Company representatives can also be limited to adjusting only informal complaints to fall within the protection of Section 8(b)(1)(B). All foremen had that authority.

In the *New England* case, *supra*, and in *Illinois Bell*, 192 NLRB 85 (1971) two cases involving sister Bell System companies, it was held that the same first line supervisory positions involved in this case were 8(b)(1)(B) representatives. The positions involved in *Illinois Bell* had almost the identical titles—PBX Installation Foreman, Building Cable Foreman, and General Foreman.

Local 1122's position would do serious damage to the grievance procedure agreed to by the Company and the CWA and adhered to over the years. Article 11 of the Agreement clearly states that the Company representative at the first step of the grievance procedure is the immediate supervisor or his alternate, and requires further that the parties shall attempt in good faith to resolve grievances at *this level.*

For years the parties to the contract have functioned under the assumption that grievances can be, and in fact, are often resolved at the first step by the immediate supervisor. If a first line supervisor cannot resolve or adjust grievances without instructions from his superior, who is the second line supervisor, then there is no need for the first step. The grievances might just as well be filed at the second step.

It is interesting that on the crucial issues before this Court, Local 1122 has taken positions that are contrary to those taken by the collective bargaining agent, the CWA. It is respectfully urged that a decision based upon such a conflict between a national union and its constituent local would not be sound.

POINT III

The Board was correct in its conclusion that Local 1122 violated Section 8(b)(1)(A) of the Act.

A violation of Section 8(b)(1)(A) occurs where a union seeks to enforce rules of behavior that violate the public policy of the Act. *Scofield* v. *NLRB*, 394 U.S. 423, 430 (1968); *NLRB* v. *Marine Workers*, 391 U.S. 418 (1968). In *Scofield, supra*, the Supreme Court stated:

> ". . . It has become clear that if the rule invokes or frustrates an overriding policy of the labor laws, the rule may not be enforced, even by fine or expulsion without violating section 8(b)(1)." (at 429)

The Court stated further:

> ". . . [S]ection 8(b)(1) leaves a union free to enforce a properly adopted rule which reflects a legitimate union interest, impairs no policy Congress has embedded in the labor law, . . ." (at 430)

In *Rochester Telephone, supra*, the Board concluded, and this Court agreed, that the union's directive violated Sections 8(3) and 8(d) and that the internal union charges against the members therefore violated Section 8(b)(1)(A):

> "As to . . . the union member, we find that the Union's action constituted restraint and coercion not sanctioned by the proviso to section 8(b)(1)(A) because the charges against her did not stem from violations of a lawful union rule dealing with purely internal matters, but to the contrary, *sought to enforce conduct violative of sections 8(d) and 8(b)(3) of the Act.*" (474 F.2d 873) (Emphasis added)

See also *International Union District 50 (International Grinding Wheel Co.)*, 176 NLRB 628 (1969), relied on by the Board in *Rochester Telephone.*

However, Local 1122's 8(b)(1)(A) violation does not stem only from its 8(b)(3) violation. This is clear from the decision of the United States Supreme Court in *NLRB* v. *Allis Chalmers Mfg. Co.*, 388 U.S. 175 (1967), where the Court said:

> "Thus this history of congressional action does not support a conclusion that the Taft-Hartley prohibitions against restraint or coercion of an employee to refrain from concerted activities included a prohibition against the imposition of fines on members who decline to honor an authorized strike and attempts to collect such fines. Rather, the contrary inference is more justified in the light of the repeated refrain throughout the debates on Section 8(b)(1)(A) and other sections that *Congress did not propose any limitations with respect to the internal affairs of unions, aside from barring enforcement of a union's internal regulations to affect a member's employment status.*" (at 195) (Emphasis added)

A significant purpose of the Company's practice of appointing bargaining unit employees as acting supervisors is to evaluate employees for permanent promotion. Local 1122's ban combined with its commencement of internal union disciplinary proceedings against union members which could result in fines or expulsion, can have no effect except to coerce employees into not accepting acting supervisory positions. The employee's opportunity to change his employment status by promotion to management is thus severely curtailed. The thrust of *Allis-Chalmers, supra,* is that such an enforcement of a union's internal regulations

to affect the employment status of employees is within the prohibition of Section 8(b)(1)(A).

There is another reason for holding that Local 1122's action was beyond its legitimate concern as a union. Its actions were in direct violation of the CWA's Constitution and the directive of Morton Bahr, CWA Vice President for District One. The CWA Constitution permits members to accept temporary supervisory positions for a limited period of time and retain their membership. Because of this, Morton Bahr advised his District One Staff in 1973 that bans such as the one adopted by Local 1122 violated the CWA constitution. In view of the position of the CWA, it is difficult to believe that the concerns expressed by Local 1122 in its brief (Point I) were legitimate union concerns.

Conclusion

For all the reasons stated, it is respectfully prayed that the Board's order and decision that Local 1122 violated Sections 8(b)(1)(A) and (B) and 8(b)(3) of the Act must be affirmed and enforced in all respects.

Respectfully submitted

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Dated: April 1, 1977

ADDENDUM

JD-392-76
Boston, MA

UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

Case No. 1-CB-2861

SYSTEM COUNCIL T-6, INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, AFL-CIO, CLC and LOCALS 2222, 2313, 2315, 2320, 2321, 2322, 2324, 2325, 2326, and 2327, INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, AFL-CIO, CLC

and

NEW ENGLAND TELEPHONE AND TELEGRAPH COMPANY.

Robert C. Rosemere, Esq.,
of Boston, MA, for the
General Counsel.

James O. Hall Esq.
(Angoff, Goldman, Manning, Pyle & Wanger), of Boston, MA,
for the Respondents.

William J. McDonald, Esq.,
and *Joseph D. D'Arrigo, Esq.,*
of Boston, MA, for the
Charging Party.

DECISION

STATEMENT OF THE CASE

JULIUS COHN, Administrative Law Judge: This case was tried at Boston, Massachusetts, on February 2 and 3, 1976. Upon a charge filed and served February 28, 1975, the Regional Director for Region 1 issued the complaint in this proceeding on September 23, 1975, alleging that System Council T-6, International Brotherhood of Electrical Workers, AFL-CIO, CLC and Locals 2222, 2313, 2315, 2320, 2321, 2322, 2323, 2324, 2235, 2326 and 2327, International Brotherhood of Electrical Workers, AFL-CIO, CLC, herein collectively called Respondents, violated Sections 8(b)(3), 8(b)(1)(B), and 8(b)(1)(A) of the Act. Respondents filed an answer denying the commission of unfair labor practices.

ISSUES

Whether Respondents, by imposing and enforcing a ban on the acceptance of their members of temporary supervisory positions, unilaterally changed existing conditions in violation of Section 8(b)(3) of the Act.

Whether Respondents restrained the Company in the selection of supervisors and therefore its representatives for the adjustment of grievances in violation of Section 8(b)(1)(B) of the Act.

Whether by enforcing the ban against the acceptance of temporary supervisory positions Respondents restrained employees in violation of Section 8(b)(1)(A) of the Act.

All parties were given full opportunity to participate, introduce relevant evidence, to examine and cross-examine witnesses, to argue orally and to file briefs. All parties submitted briefs which have been carefully considered.

On the entire record in the case and from my observation of the witnesses and their demeanor, I make the following:

FINDINGS OF FACT

I. The Business of the Company

New England Telephone and Telegraph Company, herein called the Company, is a New York corporation having a principal office and place of business in Boston, Massachusetts and other officers and facilities in the State of Massachusetts, New Hampshire, Vermont, Maine and Rhode Island. The Company is engaged in the business of providing intrastate and interstate communications and related services and, during the past year, derived gross revenues exceeding $2,000,000 of which revenues in excess of $2,000,000 were received from services rendered between the above-mentioned States and other States of the United States. The complaint alleges, Respondents admit, and I find that the Company is engaged in commerce within the meaning of the Act.

II. The Labor Organizations Involved

Respondent local unions are all labor organizations within the meaning of the Act. The parties have stipulated and I find that System Council T-6, International Brotherhood of Electrical Workers, AFL-CIO, is a labor organization within the meaning of the Act.

III. The Alleged Unfair Labor Practices

A. *The Facts*

The facts as described herein are almost entirely contained in a written stipulation agreed to by all of the parties and made part of the record.

The International Brotherhood of Electrical Workers, AFL-CIO was certified in 1970 as the collective-bargaining representative for approximately 30,000 employees of the

Company in three bargaining units: Plant, Traffic and Accounting. The bargaining rights were assigned to the Locals named herein as individual Respondents and, in 1973, System Council T-6 was chartered by the International and is composed of representatives of the Locals. The Council has authority on behalf of the Local Unions to deal with the representatives of the Company as the authorized agent of the Local Unions in all matters pertaining to collective bargaining.[1]

At the time Respondents acquired bargaining rights they adopted and maintained the collective bargaining agreements then in effect between the Company and the former bargaining representatives of the employees in the three units, until September 26, 1971 when three new agreements negotiated by Respondents and the Company became effective. Upon expiration of those agreements, the current agreements were negotiated and became effective August 4, 1974 until August 6, 1977.

The current and prior Plant agreements contain the following Article 27.07:

> Time spent on any permanent management assignment is excluded from the computation of bargaining unit seniority. Time spent on any temporary management assignment is excess of 90 calendar days in a year is

1. The appropriate units as certified by the Board are: All central office employees, clerical employees and staff employees, administrative employees and dining service employees in the Employer's Traffic Department but excluding guards, professional employees and supervisors as defined in the Act.

All non-supervisory employees of the Employer's Plant Department, scheduled engineering employees in occupations formerly under Plant jurisdiction and non-supervisory employees in the general services department in occupations formerly under Plant jurisdiction, but excluding all professional employees, all other employees and supervisors as defined in the Act.

All non-supervisory employees of the Employer's accounting and general services departments (excluding House Service, Reproduction and Service Bureau employees), but excluding all other employees as defined in the Act.

> excluded from the computation of bargaining unit seniority.

The 1974 Accounting agreement contains the following provision, Article 17B.04:

> Employees returning to the Accounting bargaining unit from a management assignment, for the purpose of seniority, will forfeit any time spent out of the collective bargaining unit. Time spent on any temporary management assignment in excess of 90 calendar days in a calendar year is excluded from the computation of bargaining unit seniority.

The first sentence of Article 17B.04 appeared in the 1971 agreement but the second sentence of the provision as quoted was negotiated into the 1974 agreement.

There is no similar provision relating to bargaining unit employees who have been temporarily assigned as supervisors in the last two Traffic agreements. However the issue of accrual of bargaining unit seniority by temporarily assigned supervisors was the subject of an arbitration proceeding in which the award held that no bargaining unit seniority is accrued during temporary assignments as supervisors. The award further found that the collective bargaining contract neither bars unit employees from accepting such appointments nor deprives them of their contractual seniority rights when they return to the bargaining unit. During the 1974 negotiations concerning the Traffic agreement, the Company proposed a clause similar to the 90-day limitations provided in the Plant and Accounting agreements. The Union insisted that the arbitration award remain in effect and the Company agreed.

Respondents do not dispute the right of the Company to select bargaining unit employees for temporary assignments as supervisors. However, Respondents take the position that they may from time to time establish and enforce a union rule that no union members are to take a temporary management assignment.

Effective October 26, 1974 the Respondents established the rule that members were not to take temporary assignments as supervisors. This action was taken without official notice to or bargaining with the Company. The assignments are first level supervisory assignments referred to in the agreements as "Immediate Supervisor." The rule or ban, as it is called, is still in effect and neither party has requested to bargain about it. Respondents announced the ban by taped messages, bulletins, newsletters, and all communications to bargaining unit employees. As a result employees, including union members, have relinquished temporary promotions and others have refused to accept temporary assignments as supervisors. Some union members who did not comply have been told that they would be brought up on charges, fined or otherwise disciplined by Respondents and some union members have actually been charged, fined, or otherwise disciplined.

In the past Respondents have established such a ban at the following times: In the summer and fall of 1971 during contract negotiations; during the fall of 1971 after the 1971 agreements went into effect; in part of the summer of 1974 during contract negotiations; and after execution and ratification of the 1974 agreements. Some locals who imposed the ban in the summer of 1974 continued it into effect until the establishment of the ban by Respondents on October 26, 1974 and thereafter. On all of these occasions there was no official notice to or bargaining with the Company by the Respondents' negotiating committee concerning the ban, nor did either party request to bargain about it. During these occasions certain field management employees of the Company, other than members of the bargaining committees, learned directly from employees and officials of Respondents that some of the locals had established the ban. Certain field management employees complained about the inconveniences resulting from the ban but the Company bargaining committee for each unit did not officially protest the establishment of the ban on the above-

noted occasions or during the time of the current ban. Some union members who violated past bans while in the Plant bargaining unit have been charged and in some cases disciplined and fined. The parties stipulated that if called to testify, members of the Company's bargaining committee would testify that they had no knowledge of any enforcement of these past bans.

Under the 1971 and 1974 agreements, only Respondents or an employee could file grievances and only the Respondents could demand arbitration of a grievance. Although there is no provision in the Respondents' constitution and by-laws concerning resignation by members, members have resigned.

Employees have in the past refused to accept a temporary assignment as supervisor when there was no ban in effect, and the Company has not disciplined any employee for refusing to accept such temporary assignment. When an employee on temporary assignment has to be returned to the bargaining unit the Company processes the necessary papers and the Company has allowed each employee to choose whether to accept or reject a temporary assignment as supervisor.

If called to testify, officials of Respondents would state that they imposed the bans for some or all of the following reasons: Inherent difficulties in a bargaining unit employee being a coworker at one time and a supervisor at others; to eliminate the possibility of a union member being placed in a position of performing unit work during a strike or other dispute; to prevent a union member being on the side of the Company during times of difficulty or tension; to prevent union members from having divided loyalties; to prevent union members from back filling for supervisory employees engaged in strike breaking at other companies of the American Telephone and Telegraph Company; and disagreement from time to time with Company policies and practices.

In addition to the above stipulated facts, the Company called as a witness, its General Labor Relations Supervisor, Ralph Hannabury. Among his other duties, Hannabury has been a member of the Plant bargaining committee since 1964. He testified without contradiction to a number of facts which may be instructive. There are approximately 12,000 employees in the Traffic unit, 16,500 in the Plant unit and 1,500 in the Accounting unit who are employed in company facilities in five states. There are 2,500 to 3,000 first level supervisors in the three bargaining units, of whom more than 95 percent had been promoted from the bargaining units. Temporary supervisors receive a wage differential of about 15 percent during the period of their service as supervisors. The Company has a bargaining committee for each of the three units and the chairman of each committee has authorization from the Company president to engage in collective bargaining.

Hannabury also testified that he participated in the 1971 negotiations, and during a discussion concerning Article 27.07 of the Plant agreement, James Mulvey[2] stated that the "Union had no say in who you set up, or what you pay them while set up, or who you set back, and what you pay them in set back treatment."[3] Mulvey, when called by Respondents, initially denied making the statement at a bargaining session which was attributed to him by Hannabury. However he thereafter admitted that he could have said "We have no say in who they select for set up or set back." But he denied that he made or could have made any statement concerning the pay of people set up or set back because that would have been controlled by the collective bargaining agreement. This apparent conflict in testimony is of no effect since Respondents have agreed and stipulated that the Company has the right to make temporary promo-

2. Then Business Manager of Local 2325, IBEW, and now Chairman of System Council T-6.

3. A set up is a promotion to temporary supervisor and a set back is a return to the bargaining unit.

tions to supervisory positions which is the only relevant issue raised by this testimony.

The Company also called Edward F. Callahan, a plant service manager who supervises craft employees in the bargaining unit, as a witness. He recalled talking to a local shop steward at a time when the Union established a ban in the summer of 1974 and on other prior occasions. He then expressed his opinion to the shop steward that he felt it was wrong for Respondents to take an action which would deny an individual from advancing himself and getting a 15 percent increase at the same time. Callahan said that the only response he received from the steward was that this was done at the orders of higher union officials. Following this testimony the parties stipulated that other witnesses for the Company, if called, would testify to the same effect and in similar words as Callahan, it being understood that the words Callahan used in talking to the steward were the reflections of his own opinion and beliefs.

B. *The alleged Violation of Section 8(b)(3) of the Act*

The General Counsel contends that Respondents have unilaterally changed existing terms and conditions of employment by its ban on the acceptance by members of temporary supervisory positions and thereby has refused to bargain in good faith with the Company. I find that this case is controlled by the decisions of the Board and the Court in *Communications Works of America, AFL-CIO, Local 1170 (Rochester Telephone Corporation)*, 194 NLRB 872 (1972), enforced 474 F. 2d 778, 82 LRRM 2101 (C.A. 2, 1972). In that case the union, during negotiations for a prior contract, proposed the elimination of the company's practice of assigning unit employees to act as temporary supervisors, a policy concerning which the union had long complained. After several discussions, the union agreed to withdraw its demand that the practice be abolished and

requested that the employer limit the duration of temporary assignments to no more than 30 days and not assign employees to supervise their own groups. The company then outlined its procedures and promised that employees would not be assigned to supervise their own work groups whenever possible. This was done by letter which was reaffirmed by an exchange of letters between the Company and the union several months later. Thereafter when a new contract was renegotiated, the subject was not raised by either party. Subsequently the union voted to ban the acceptance of all temporary supervisory positions by unit employees and to penalize those who violated the ban. The union filed charges against two employees, one a union member and one a nonmember, who had accepted the temporary supervisory assignments. The Board found that the fact that the contract contained no provisions with respect to the practice of the employer in appointing temporary supervisors, was not due to the parties' failure to reach agreement but rather reflected the parties agreement to continue the practice. It found that "the earlier understandings and written statement of policy clearly were intended to, and did, continue as an integral part of the totality of a contract between the parties. In these circumstances, the union's attempt unilaterally and in mid-term to alter the existing agreement constituted a violation of Section 8(b)(3) of the Act. By the same token, although the union was free to request discussion, the company was not required by Section 8(d) of the Act to agree to, or even to bargain with the union about, changing the existing agreement during its term."

It is clear therefore that in reaching its decision the Board relied on the parties' agreed upon practice which was reduced to writing although not a part of the collective bargaining agreement itself. In the instant case we are dealing with three collective bargaining agreements covering three separate units. While none of the agreements contain express language giving the Company the right to

make temporary supervisory appointments, two of them contain negotiated language indicating that the parties intended the Company to have such right. Both the current and prior agreements affecting the Plant union provide in Article 27.07 that "Time spent on any temporary management assignment in excess of 90 days in a calendar year is excluded from the computation of bargaining unit seniority." The same provision was negotiated into the 1974 agreement for the Accounting bargaining unit, (Article 17B.04, second sentence). The Traffic agreements contain no such provision, but as noted above, the issue is accrual of bargaining unit seniority by employees temporarily assigned as supervisors was arbitrated. The award held that bargaining unit seniority was not accrued during temporary assignments and the contract neither barred unit employees from accepting such promotions nor deprived them of their contractual seniority rights when they returned to the bargaining unit. With regard to the Traffic unit the Company proposed during 1974 negotiations a similar clause to that which is contained in the Plant and Accounting agreements. The Union insisted that the arbitration award remain in effect and the Company agreed.

Surely the seniority provisions in the written contracts covering the Plant and Accounting units could have no meaning or application unless the Company had the right to make temporary assignments to supervisory positions. In addition the arbitration award concerning accrual of seniority for Traffic unit employees must be based on the underlying right of the Company to make these assignments. Moreover this power of the Company was derived from the negotiations in 1971 and 1974 plus the agreement of the parties that the arbitration award regarding the Traffic unit remain in effect. Thus the rights of the Company in this area are firmly embedded in the contracts in two units, and in contract negotiations and an arbitration award in the third unit. The argument that this is an existing condition under the agreements is even stronger

than in the *Rochester* case. In any event by virtue of their stipulation Respondents agree and do not dispute the right of the Company to select bargaining unit employees for temporary assignments as supervisors. Accordingly, I find, as in *Rochester,* that the Company's practice of making these appointments derives from the collective bargaining agreements themselves and the Respondents' ban on acceptance by members of these positions constitute an attempt unilaterally to alter the existing agreements and therefore violated Section 8(b)(3) of the Act.

Respondents raised several contentions with respect to the alleged violation of Section 8(b)(3) which I find to be without merit. In the stipulation Respondents asserted the position that it may from time to time establish and enforce a *union* rule such as it did in this situation. As the Company's right to make temporary supervisory assignments is found in the contract, it follows that the ban on any bargaining unit employees accepting such assignments involves a unilateral change in contract conditions. Respondents further assert the Company has failed to request bargaining with them concerning the imposition of the bans. Of course there is no obligation on the Company to bargain under Section 8(d) even if requested by Respondents concerning a change in existing contractual provisions during the life of the agreement.

Respondents also urge that the Company waived its right to protest the ban imposed in October 1974, for the reason that it failed to protest similar bans on previous occasions as described above. With respect to statutory rights, the Board and courts have repeatedly held that in the absence of "clear and unmistakable language to the effect," waivers will not be readily inferred.[4] In the circumstances of this case, Respondents cannot point to any written document or provision indicating a waiver by Company of its rights, only to inaction on several occasions to

4. See *Gary-Hobart Water Corp.* v. *N.L.R.B.,* 511 F. 2d 284 (C.A. 7, 1975); *Suburban Transit Corp.,* 218 NLRB 185 (1975).

enforce them. For whatever reasons the Company may have had for not pursuing the matter on prior occasions, and, it is noted, that these occurred during collective bargaining negotiations, it is apparent there was no express conduct on the part of the Company which would indicate it was waiving its rights formally and legally to protest the ban.[5]

C. *The Violation of Section 8(b)(1)(A) of the Act*

The Board found in *Rochester, (supra)*, that the union's action in subjecting unit employees to disciplinary action for refusing to comply with its ban against accepting temporary supervisory assignments violated Section 8(b)(1)(A) of the Act. It stressed that, even as to union members, the union's action constituted restraint and coercion not sanctioned by the proviso to Section 8(b)(1)(A) because the charges did not stem from violations of a lawful union rule dealing with purely internal union matters, but, rather sought to enforce conduct found violative of Section 8(d) and 8(b)(3) of the Act. While in other circumstances such as the absence of contractual provision or policy or practice empowering an employer to make temporary supervisory assignments, a ban on the ac-

5. In its brief Respondents raised for the first time an argument that this matter should be barred by Section 10(b) of the Act. Section 10(b), though an affirmative defense, was neither pleaded or in any manner litigated at the hearing. Section 10(b) is a Statute of Limitations, and is not jurisdictional. *A. H. Belo Corp.*, 411 F. 2d 959 (C.A. 5). As such, it may be waived by a respondent not raising it in timely fashion. See *J. E. Nettleton Co.*, 241 F. 2d 130 (C.A. 2). In these circumstances I find that Respondents have waived a defense under Section 10(b) of the Act. In any case, it does not appear that such defense would be meritorious. The complaint in this case based upon a charge filed February 28, 1975 alleges conduct occurring since October 15, 1974, less than 6 months prior to the filing of the charge. The stipulation states that Respondents established the ban effective October 26, 1974, well within the 10(b) period. In asserting the 10(b) defense, Respondents rely on the Company's failure to proceed against the prior bans, thus resurrecting their waiver argument discussed above.

ceptance of such positions applied to union members, may be valid as an exercise of traditional union functions, this is not the situation in the instant case. It is the Respondents' attempt unilaterally to alter an existing agreement in violation of Section 8(b)(3) which gives rise to the restraint and coercion in violation of Section 8(b)(1)(A). Respondents' reliance on *Scofield* v. *N.L.R.B.*, 394 US 423 (1969) is misplaced because as the Court of Appeals stated in *Rochester,* at 82 LRRM 2104, the very principles enunciated by the Supreme Court in *Scofield* are applicable here. In *Scofield,* the Supreme Court said that the enforcement of a rule may be handled as an internal union matter and may not necessarily violate Section 8(b)(1)(A) of the Act, "unless some impairment of a statutory labor policy can be shown." It further states that "it has become clear that if the rule invades or frustrates an overriding policy of the labor laws, the rule may not be enforced even by fine, expulsion, without violating Section 8(b)(1)." 394 US at 429.

I find therefore following the Board and Court in *Rochester* that the Respondents' conduct in subjecting employees to disciplinary action for refusing to comply with the embargo constituted a violation of Section 8(b)(1)(A) of the Act.

D. *The Alleged Violation of Section 8(b)(1)(B)*

Unlike *Rochester,* the complaint herein also alleges that Respondents by their enactment and enforcement of the ban, restrained the Company in the selection of supervisors in violation of Section 8(b)(b)(B). There is no question on the basis of the stipulation and the contracts that the temporary supervisory positions are those which involve the incumbents in the grievance procedures.

The parties have discussed at great length, the holding of the Supreme Court in the case of *Florida Power & Light Company* v. *IBEW, Local 641,* 417 US 790 (1974), 86 LRRM 2689, and various subsequent decisions of the Board

interpreting that case. In *Florida Power,* the Court held that the respondent unions did not violate Section 8(b)(1)(B) of the Act, when they disciplined their supervisor-members for performing rank-and-file struck work. The Court's decision involved a determination of the reasonable effect of the discipline meted out to the supervisors by the union on the activities of that supervisor as an 8(b)(1)(B) representative.[6] Thus those cases are concerned with union discipline of supervisors for activities after they have already been designated and have been acting as supervisors. The issue in this case is a more basic one under Section 8(b)(1)(B), as it is concerned with the selection of supervisors by an employer. In this connection *Florida Power* is important because of its teaching with respect to the background and legislative history of Section 8(b)(1)(B).

The Supreme Court said "by its terms, the statute proscribes only union restraint or coercion of an employer 'in the selection of his representatives for purposes of collective bargaining or the adjustment of grievances,' and the legislative history makes clear that in enacting the provision Congress was exclusively concerned with union attempts to dictate to employees who would represent him in collective bargaining and grievance adjustment." (At 86 LRRM 2694) It is clear that we are dealing with a situation that more closely reflects the legislative intent and is a more fundamental part of Section 8(b)(1)(B). There can be no doubt that the Company was restricted in its choice of temporary supervisors because as a result of Respondents' rule, employees not only refused to accept such assignments but some actually relinquished the positions after having assumed them. In addition others who refused to observe the ban were either threatened or bought up on charges, or fined or disciplined. I find that the total effect of the ban established by Respondents and its enforcement thereof restrained the Company in the selection of supervisors as proscribed by the statute.

6. See *Chicago Typographical Union No. 16 (Hammond Publishers, Inc.)*, 216 NLRB No. 149 (1975).

The Respondents' contention that the Company was not really restrained because its rule applied only to union members in a situation where the collective bargaining agreements provided for an agency shop rather than union security is not valid. Although there are undoubtedly unit employees who are not members of Respondents and the Company could have made its selection from this group, nevertheless manifestly such selection would be limited to only a portion of the unit employees and a partial restraint is still violative of the Act. There is more appeal to Respondents' contention that the issue of an employer appointing bargaining unit employees as temporary supervisors is a delicate matter which should be best left for collective bargaining between the parties. However the avenue is foreclosed to Respondents because collective bargaining in this case had determined the right of the Company to make such appointments. And it has already been found that Respondents' declaration and enforcement of the rule involved an illegal unilateral change of an existing condition of employment. In this context a violation of Section 8(b)(1)(B) may be said to be a foreseeable consequence of Respondent's conduct.[7]

Accordingly I find that Respondents' conduct in instituting the ban on acceptance of temporary supervisory positions in October, 1974, and enforcing it, constituted restraint and coercion of the Company in the selection of supervisors in violation of Section 8(b)(1)(B) of the Act.

IV. The Effect of the Unfair Labor Practices Upon Commerce

The activities of the Respondents set forth in section III, above, occurring in connection with the operations of the Company described in section I, above, have a close, intimate and substantial relationship to trade, traffic and

7. *The Radio Officers' Union of the Commercial Telegraphers Union, AFL (A.H. Bull Steamship Company)* v. *N.L.R.B.*, 347 U.S. 17 (1954).

commerce among the several States and tend to lead to labor disputes, burdening and obstructing commerce and the free flow of commerce.

V. The Remedy

Having found that Respondents have engaged in certain unfair labor practices I shall recommend that it be ordered to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act.

Having found that Respondents penalized or fined employees because of the ban I shall recommend that Respondents reimburse any employee for any fine or penalty assessed against such employee for their violation of the Respondents' ban. In addition it has been stipulated and found that certain employees, who had been acting as temporary supervisors when Respondents instituted the ban, were forced to give up such positions because of Respondents' conduct. Inasmuch as the temporary supervisory position involved a 15 percent increase over the employees' unit pay, I shall recommend that such employees be reimbursed for any losses of these pay increments they may have sustained as a result of the Respondents' enforcement of its ban. Contrary to the request and the position of the Company in this connection, I shall not recommend that employees other than those already acting as temporary supervisors be reimbursed for any loss of pay increment. In this latter connection it is noted that the assumption of temporary supervisory positions was voluntary on the part of the employees and I find that it is purely speculative to determine which employees would have been offered these positions by the Company and, if so, which of those offered would have accepted the position in any event. As to those employees who were forced to give up a temporary supervisory position as set forth above, any backpay due to them is to be determined in accordance with the formula set forth in *F. W. Woolworth Company*, 90 NLRB 589 (1950), and *Isis Plumbing & Heating Co.*, 138 NLRB 716 (1962).

CONCLUSIONS

1. The Company is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. The Respondents are labor organizations within the meaning of Section 2(5) of the Act.

3. By unilaterally instituting, maintaining and enforcing a ban against the acceptance by employee members in the units found appropriate herein, of assignments to positions as temporary supervisors, Respondents violated Section 8(d) and 8(b)(3) of the Act.

4. By enforcing this ban found violative of the Act, by threats of penalties, or bringing charges against employees, or penalizing employees, Respondents violated Section 8(b)(1)(A) of the Act.

5. By its conduct in enforcing the ban against acceptance, by employee-members of Respondents, of temporary supervisory positions, Respondents restrained and coerced the Company in the selection of representatives for the purpose of collective bargaining or the adjustment of grievances, in violation of Section 8(b)(1)(B) of the Act.

6. The aforesaid unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

Upon the foregoing findings of fact and conclusions of law and upon the entire record and pursuant to Section 10(c) of the Act I hereby issue the following recommended:[8]

8. In the event no exceptions are filed as provided by Section 102.48 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Section 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

ORDER

Respondents System Council T-6, International Brotherhood of Electrical Workers, AFL-CIO, CLC and Locals 2222, 2313, 2315, 2320, 2321, 2322, 2324, 2325, 2326, and 2327, International Brotherhood of Electrical Workers, AFL-CIO, CLC, their officers, agents, representatives, successors and assigns, shall:

1. Cease and desist from:

(a) Instituting, maintaining, or enforcing any ban or embargo against the acceptance by unit employee union members of assignments to positions as temporary supervisors, without affording the Company a timely opportunity to bargain within the meaning of Section 8(d) of the Act.

(b) Restraining or coercing employees in the exercise of their rights guaranteed in Section 7 of the Act, by threatening to impose penalties upon employees, or bringing charges against employees or penalizing employees for accepting assignments to positions as temporary supervisors in violation of Respondents' ban against such action effective October 26, 1974.

(c) Restraining or coercing New England Telephone and Telegraph Company in the selection or representatives for the purpose of collective bargaining or adjustments of grievances by engaging in the conduct set forth in (a) and (b) above.

2. Take the following affirmative action which it is found will effectuate the policies of the Act:

(a) Cancel, withdraw and rescind the ban or embargo effective October 26, 1974 and immediately notify the Company, in writing, that such action has been taken.

(b) Cancel, withdraw and rescind and charges which have been filed against any employees because of the ban effective October 26, 1974 and immediately notify such employees by personal letter that such action has been taken.

(c) Cancel, withdraw and rescind any penalty which has been assessed against any employee because of the ban or embargo and reimburse any such employee for any penalty which has been assessed for such reason.

(d) Make whole any employee who had accepted appointment as temporary supervisor prior to the instituting of the ban and who was forced to relinquish such position by reason of the ban, or the threat or imposition of penalty, should they remain as temporary supervisors during the existence of the ban. Such employees shall be made whole in accordance with the manner set forth in the section of this decision entitled "The Remedy."

(e) Post at its business office and meeting hall copies of the attached notice marked "Appendix."[9] Copies of said notice, on forms provided by the Regional Director for Region 1, after being duly signed by Respondents' authorized representatives shall be posted by Respondents immediately upon receipt thereof, and be maintained by them for 60 consecutive days thereafter, in conspicuous places, including all places where notices to members are customarily posted. Reasonable steps shall be taken by Respondents to insure that said notices are not altered, defaced, or covered by any other material.

9. In the event that the Board's Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall be changed to read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

(f) Furnish the Regional Director for Region 1 with signed copies of said notice for posting by New England Telephone and Telegraph Company, if willing, in places where notices to employees are customarily posted.

(g) Notify the Regional Director for Region 1, in writing, within 20 days from the date of this Order, what steps Respondents have taken to comply herewith.

Dated at Washington, D. C. June 17, 1976.

/s/ JULIUS COHN

Julius Cohn
Administrative Law Judge

#6021

Affidavit of Service by Mail

In re:

Communications Workers of America v NLRB and New York Telephone Company

State of New York
County of New York, ss.:

Harry Minott,

being duly sworn, deposes and says, that he is over 18 years of age.

That on APR 7 - 1977, 197 , he served 2 copies of the within Brief

in the above-named matter on the following counsel by enclosing said two copies in a securely sealed postpaid wrapper addressed as follows:

Lipsitz, Green Fahringer, Roll, Schuller & James, Esqs.
One Niagara Square
Buffalo, New York 14202
Att: Richard Liipsitz, Esq.
(Attorneys for Petitioner AFL-CIO, Local 1122)

National Labor Relations
1767 Pennsylvania Avenue
Room 1222
Washington, D.C. 20570
Att: Joseph Oertel, Esq.
(General Counsel National Labor Relations Board)

Thomas H. Seeler, Regional Director
Region 3
111 West Huron Street
Buffalo, New York 14202

and depositing same in the official depository under the exclusive care and custody of the United States Post Office Department within the City of New York.

and depositing same at the Post Office located at Howard and Lafayette Streets, New York, N. Y. 10013.

Harry Minott

Sworn to before me this 7th day of April, 1977

Jack A. Messina

JACK A. MESSINA
Notary Public, State of New York
No. 30-2673500
Qualified in Nassau County
Cert. Filed in New York County
Commission Expires March 30, 1979

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